A

LOW SOO SONG

v.

PP

B

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
HASAN LAH JCA
[CRIMINAL APPEAL NO: P-05-1-2004]

C

21 NOVEMBER 2007

CRIMINAL LAW: *Firearms (Increased Penalty) Act 1971 - Section 3 - Discharge of firearm in commission of robbery - Appeal against conviction and sentence - Cautioned statement - Whether ingredients of*

D

offence established - Whether totality of evidence supported finding of guilt

EVIDENCE: *Admissibility - Forensic and medical evidence - Whether unsatisfactory even if admissible - Whether conviction unsafe - Question of fact - Criminal Procedure Code, s. 399 - Evidence Act 1950, s. 45*

E

The appellant was convicted for an offence under s. 3 of the Firearms (Increased Penalty) Act 1971 ('Act') and sentenced to death. The substance of the charge against him was that he discharged a firearm in the commission of a robbery, a scheduled offence under the Act, with intent to cause death or hurt. In the

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present appeal against his conviction, the appellant raised three main grounds of complaint in support of the appeal: (i) that the trial judge had wrongly admitted the appellant's cautioned statement in evidence and acted upon it; (ii) that the prosecution had failed to establish the ingredients of the offence at the close

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of its case and as such the trial judge ought not to have called upon the appellant to enter his defence to the charge; and (iii) that having regard to the totality of the evidence, the appellant's conviction was unsafe and should not be permitted to stand.

H

Held (dismissing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) It appeared that there were some unsatisfactory features in

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regard to the cautioned statement which amounted to a confession. Without accepting the submission that it ought not to have been admitted, this court would *ex abundanti cautella*

exclude it altogether from its consideration when deciding upon this appeal. The only question was whether there was other cogent evidence to support the conviction. By virtue of s. 390 of the Penal Code, theft is an element of robbery. Consequently, the act of the appellant's friend of forcibly removing the chain and bracelet from the person of PW3 without her true consent amounted to theft. There was the evidence of PW3 that it was the appellant who discharged the firearm resulting in PW3's daughter, PW4, being injured. There was no doubt in these circumstances that it was an irresistible inference that the appellant had the required intent proscribed by s. 3 of the Act. Given the traumatic circumstances in which PW3 faced the appellant and his accomplice, it was entirely understandable that PW3 had some difficulty in recalling at the trial each and every part of the robbery as it unfolded before her. But her evidence on points of critical importance remained intact. It was the appellant who held the pistol; it was his accomplice who committed the robbery and it was the appellant who discharged the firearm. The trial judge was therefore entirely correct in acting upon her evidence. (paras 4, 5, 6 & 10)

(2) It was also argued that the medical and forensic evidence was either inadmissible or if it was admissible, it was of an unsatisfactory nature. One contention was that the medical report tendered by the prosecution at the trial did not come from a Government doctor and was therefore inadmissible under s. 399 of the Criminal Procedure Code. The short answer to this argument was that the doctor concerned did give evidence and his evidence as to the nature of the wound was clearly admissible by virtue of s. 45 of the Evidence Act 1950. The fact that no evidence of an exit wound on PW4 was produced by the doctor was equally irrelevant as he gave evidence that the bullet had passed through PW4. It was next submitted that neither the weapon nor the bullet that had passed through PW4 had been produced and that this rendered the conviction unsafe. With respect, there was no merit in this argument. According to the evidence, the last person with the weapon was the appellant. Only he would know what happened to it. As such, the police could not be expected to produce the weapon that was fired by the appellant. As for the non-production of the bullet, the issue

A was whether PW4 suffered a wound as a result of the appellant shooting at her. This was a pure question of fact upon which the trial judge accepted the evidence of PW3 and the forensic witnesses, and this court would be slow to interfere with his findings. (para 11)

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(3) Having carefully read and re-read the record and having given anxious consideration to the complaints made by the appellant, this court was satisfied that the trial court did not misdirect itself, that there was abundant evidence to establish the C appellant's guilt and that his conviction was entirely safe. (para 12)

Case(s) referred to:
Lee Yew Seng & Ors v. PP [1967] 1 LNS 82 FC ***(refd)***
PP v. Dato Mokhtar Hashim & Ors [1983] 1 CLJ 138; [1983] CLJ (Rep) 721 ***(refd)***
D
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 LNS 97 HC ***(refd)***
Ye Wei Gen v. PP [1999] 4 SLR 101 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 399
E Evidence Act 1950, s. 45
Firearms (Increased Penalty) Act 1971, s. 3
Penal Code, s. 390

For the appellant - Gooi Soon Seng; M/s Gooi & Azura
F *For the respondent - Nurulhuda Nur'aini Mohd Noor DPP*

[Appeal from High Court, Pulau Pinang; Criminal Trial No: 45-28-2001]

Reported by Suresh Nathan

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JUDGMENT

Gopal Sri Ram JCA:

H **[1]** The appellant was convicted for an offence under s. 3 of the Firearms (Increased Penalty) Act 1971 ("the Act") and sentenced to death. The substance of the charge against him is that he discharged a firearm in the commission of a robbery, a scheduled offence under the Act with intent to cause death or I hurt. The main features in case for the prosecution are as follows.

[2] On 7 March 2001, at about 8.30am, the appellant, who was known to PW3 approached her as she was entering her home in Kepala Batas. He was accompanied by another male Chinese whom PW3 described as the appellant's friend. The appellant placed one hand on PW3's shoulder, pointed a pistol at her and asked her not to shout. The appellant's friend pulled the gold chain and bracelet worn by PW3. He then grabbed a set of keys from PW3's waist and forced her into her home. No doubt traumatised by the incident, PW3 was unable to walk and she lay on the floor near the dining area. The appellant then sat on her. He still held the weapon. At about that time, PW3's daughter, PW4, emerged from her room. The appellant shot and injured PW4 and later made good his escape from the scene. The appellant was later apprehended in Thailand and returned to Malaysia to stand trial.

[3] Learned counsel for the appellant raised three main grounds of complaint in support of the appeal. His first ground was that the trial judge had wrongly admitted the appellant's cautioned statement in evidence and had acted upon it. Second, the prosecution had failed to establish the ingredients of the offence at the close of its case and as such the trial judge ought not to have called upon the appellant to enter his defence to the charge. Third, having regard to the totality of the evidence, the appellant's conviction is unsafe and should not be permitted to stand.

[4] Taking the first point, it appears that there are some unsatisfactory features in regard to the cautioned statement which amounts to a confession. Without accepting the submission that it ought not to have been admitted, we would *ex abundanti cautella* exclude it altogether from our consideration when deciding upon this appeal. The only question, then, is whether there is other cogent evidence to support the conviction. If there is, then that is the end of the matter. See, *Lee Yew Seng & Ors v. Public Prosecutor* [1967] 1 LNS 82, where the former Federal Court adopted a similar approach in relation to an inadmissible confession in a case concerning robbery as well. In the circumstances, no further comment upon the first ground is therefore required.

[5] We now turn to consider the question whether the prosecution had *prima facie* established the ingredients of the offence at the close of its case. What the prosecution had to prove is:

A (i) that there was a robbery;

(ii) that the appellant discharged a firearm in the commission of that robbery;

B (iii) that the appellant intended to cause death or hurt to some person.

[6] By virtue of s. 390 of the Penal Code, theft is an element of robbery. Consequently, the act of the appellant's friend forcibly removing the chain and bracelet from the person of PW3 without C her true consent amounted to theft. So, the first ingredient is satisfied. As for the second and third ingredients, there is the evidence of PW3 that it was the appellant who discharged the firearm resulting in PW4 being injured. There is no doubt that in these circumstances it is an irresistible inference that the appellant D had the required intent proscribed by s. 3 of the Act. The appellant's submission on this point accordingly fails.

[7] As for the third ground, this in reality is a complaint that the trial court did not judicially appreciate the evidence in its totality. E First there is the issue whether it was the appellant who committed the offence. Although learned counsel referred to this as evidence of identification in truth it is not. It is really evidence of recognition of the appellant by PW3. It is in evidence that PW3 knew the appellant. In fact she had met with him only a F short while before the robbery took place. He had come to the house inquiring after her husband. The recognition of the appellant at the material time by PW3 is much stronger than mere identification. As Hashim Yeop A Sani J (later Chief Justice of Malaya) said in *PP v. Dato Mokhtar Hashim & Ors* [1983] 1 CLJ G 138; [1983] CLJ (Rep) 721:

> As regards all these three witnesses it is important in my opinion to draw a distinction between recognition and identification. Recognition is more reliable than mere identification. Recognition of a person known to the witness would be more reliable than H identification by a witness of a stranger.

[8] Second, there is the issue whether it was the appellant who fired the shot which injured PW4. We were taken through the evidence recorded by the trial court for the purpose of I demonstrating that PW3 was not a reliable witness. Learned counsel said that there were discrepancies in her evidence and

that it was unsafe for a court to act on her testimony to conclude that it was the appellant who had discharged the firearm. However, it is apparent from the judgment under appeal that the trial judge was very much alive to the issue of PW3's credibility. At the end of the day he accepted her as a witness of truth and acted upon her evidence. In these circumstances, this court must be slow to disturb the trial court's findings of fact based on the credibility of PW3 and 4. As Yong Pung How CJ said in *Ye Wei Gen v. Public Prosecutor* [1999] 4 SLR 101:

> At any rate, the district judge had made a finding of fact that the victim had correctly identified the appellant as the perpetrator of the offence. It is trite law that an appellate court will be slow to overturn the trial judge's finding of fact unless it can be shown that his decision was plainly wrong or against the weight of the evidence before him: *Tan Chow Soo v. Ratna Ammal* [1967] 1 LNS 178, *Lim Ah Poh v. PP* [1992] 1 SLR 713, *Ng Kwee Seng v. PP* [1997] 3 SLR 205, *Yap Giau Beng Terence v. PP* [1998] 3 SLR 656 and *Syed Jafaralsadeg bin Abdul Kadir v. PP* [1998] 3 SLR 788. These cases thus stand for the principle that findings of fact by the trial judge are *prima facie* correct unless there are very good grounds for disturbing them.

[9] In *Public Prosecutor v. Datuk Haji Harun bin Haji Idris (No 2)* [1976] 1 LNS 97, Raja Azlan Shah FJ (as His Royal Highness then was) said this in relation to the appreciation of oral testimony:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore, necessary to scrutinize each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[10] Given the traumatic circumstances in which PW3 faced the appellant and his accomplice, it is entirely understandable that PW3 had some difficulty in recalling at the trial each and every part of the robbery as it unfolded before her. But her evidence on points of critical importance remained intact. It was the appellant who held the pistol; it was his accomplice who committed the robbery and it was the appellant who discharged the firearm. The trial judge was therefore entirely correct in acting upon her evidence.

[11] Lastly, it was argued that the medical and forensic evidence was either inadmissible or if it was admissible, it was of an unsatisfactory nature. One contention is that the medical report tendered by the prosecution at the trial did not come from a Government doctor and was therefore inadmissible under s. 399 of the Criminal Procedure Code. The short answer to this argument is that the doctor concerned did give evidence and his evidence as to the nature of the wound was clearly admissible by virtue of s. 45 of the Evidence Act 1950. The fact that no evidence of an exit wound on PW4 was produced by the doctor is equally irrelevant as he gave evidence that the bullet had passed through PW4. It was next submitted that neither the weapon nor the bullet that had passed through PW4 had been produced and that this rendered the conviction unsafe. With respect there is no merit in this argument. According to the evidence, the last person with the weapon was the appellant. Only he would know what happened to it. As such the police cannot be expected to produce the weapon that was fired by the appellant. As for the non-production of the bullet, the issue is whether PW4 suffered a wound as a result of the appellant shooting at her. This is a pure question of fact upon which the trial judge accepted the evidence of the PW3 and the forensic witnesses. As we have already said, this court will be slow to interfere with his findings.

[12] Having carefully read and re-read the record and having given anxious consideration to the complaints made by the appellant, we are satisfied that the trial court did not misdirect itself, that there is abundant evidence to establish the appellant's guilt and that his conviction is entirely safe. The appeal was accordingly dismissed. The conviction and sentence were affirmed.